SOBRI ARSHAD

v.

ASSOCIATED TRACTORS SDN. BHD.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[BANKRUPTCY NO. 29-844-89]
14 JANUARY 1991

BANKRUPTCY: *Affidavit affirmed before creditor's petition - Effect of - Flaw - Discretion of Court - Extension of time - Explanation for flaw - Non-compliance with time period - Strict construction of bankruptcy statutes - Bankruptcy Act 1967, ss. 6, 113 - Bankruptcy Rules 1969, r. 275.*

The judgment debtor sought to impugn the bankruptcy petition on the ground that the affidavit verifying the creditor's petition's was affirmed to one day before the date of the creditor's petition.

Held:

[1] Based on the authorities in this area, the fact that the affidavit was sworn before the presentation of the petition is a flaw in the proceedings which vitiates the creditor's petition and cannot be cured by the discretionary powers of the Court conferred by s. 133 of the Bankruptcy Act 1967.

[2] The Court cannot extend the time for filing as there is no valid petition before the Court; an unborn petition cannot be verified and a petition comes to life only when presented.

[3] Counsel for the judgment creditor, in his oral application for the re-filing of the affidavit, did not give an explanation as to how the flaw in the proceedings arose; no special circumstances and/or good cause has been shown for extension of time as required under r. 275 of the Bankruptcy Rules 1969.

[4] In addition, the judgment creditor has not complied with the six-month time period in relation to re-swearing and re-filing of the affidavit as more than eleven months have lapsed since the alleged act of bankruptcy.

[5] Bearing in mind that bankruptcy proceedings, if unsuccessful, would have harsh and penal consequences, meticulous compliance with the law is often necessary and statutes relating to bankruptcy should be construed in a manner most favourable to the person affected.

[Creditor's petition held to be invalid.]

Cases referred to:
Anon [1861] 5 LT 527
Chin Yoon Timber Co. v. Overseas Lumber Bhd. [1978] 2 MLJ 173
In re North, ex parte Hasluck [1895] 2 QB 264
Re Sutherland Manure Company [1893] 11 NZLR 460
Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise [1988] 1 MLJ 201
Western Benefit Building Society [1864] 33 Beav 368; 55 ER 409

Legislation referred to:
Bankruptcy Act 1967, ss. 6, 133
Bankruptcy Rules 1969, rr. 106, 275

Other sources referred to:

Procedural Tables No. 6 of *Atkin's Court Forms on Bankruptcy and Insolvency* (2nd Edn., Vol. 7, 1988 Issue), Step No. 7 pp. 119 & 120

For the judgment creditor - Kulwant Kaur; M/s. Lim Kim Chuan & Co.
For the judgment debtor - Thayalan Muniandy; M/s. Meena, Thayalan & Partners

JUDGMENT

Edgar Joseph Jr J:

In these bankruptcy proceedings the creditor's petition was dated 10 November 1989, but the affidavit verifying the creditor's petition was affirmed to on 9 November 1989 (the affidavit) that is to say, one day before the date of the creditor's petition. The Bankruptcy Act 1967, by s. 6 and the Bankruptcy Rules 1969, by r. 106 require that the creditor's petition must be verified by an affidavit as to the truth of the contents thereof. Counsel for the judgment debtor has therefore sought to impugn the bankruptcy petition on this ground.

It would appear that the validity of the creditor's petition depends on there being filed in Court an affidavit verifying the truth of the allegations therein. So, for example, the case of *Anon* [1861] 5 LT 527 is authority for the proposition that every petition for adjudication of bankruptcy must be accompanied with an affidavit verifying the allegations therein or it would not be received.

Furthermore, the Procedural Tables No. 6 of *Atkin's Court Forms on Bankruptcy and Insolvency* (2nd Edn., Vol. 7, 1988 Issue) Step No. 7 pp. 119, 120 reinforce that view.

There are also general considerations which supported the contention of Counsel for the judgment debtor.

It is trite law that an affidavit must be made in some cause or matter pending in Court. An affidavit cannot support an "unborn petition" as a petition comes to life only when presented. In *Western Benefit Building Society* [1864] 33 Beav. 368; 55 ER 409, Sir John Romly MR decided that an affidavit sworn before the presentation of the petition "amounts to nothing". That case was followed in the local case of *Chin Yoon Timber Co. v. Overseas Lumber Bhd.* [1978] 2 MLJ 173 where Syed Othman J (as he then was) struck out a winding-up petition because the affidavit was sworn before the presentation of the petition.

I therefore agree with submissions of the Counsel for the judgment debtor that the flaw in the proceedings hereinbefore mentioned vitiates the creditor's petition and cannot be cured by the discretionary powers of the Court conferred by s. 133 of the Bankruptcy Act. Nor, for that matter, is it open to me to extend the time for filing as there is no valid petition before the Court? As was well put in the case of *Chin Yoon Timber Company* (*ibid*)

> The question of extension or abridgment to which this rule relates, does not arise. The affidavit cannot therefore be said to relate to any proceedings. Extending what the Master of the Rolls said in the *Re Western Benefit Building Society* you cannot verify to an unborn petition; a petition comes to life only when presented

Lest I be accused of an oversight, I should perhaps refer to the case of *Sari Atlantic Sdn. Bhd. v. Aik Kim Enterprise* [1988] 1 MLJ 201, a company winding-up case, which was cited for the proposition that a defect in an affidavit such as in the present case is curable by the Court by allowing an extension of time to re-file the affidavit.

It would appear that the judgment in *Chin Yoon Timber Company* (*ibid*) was not cited to or by the Court in the *Sari Atlantic* case (*ibid*). With respect, therefore, the judgment in the latter case would appear to have been given *per incuriam.*

Moreover, even if I should follow *Sari Atlantic* case, the application by Counsel for the judgment creditor made orally in open Court to re-file the affidavit was not supported by any explanation as to how the flaw in the proceedings arose. No special circumstances and/ or good cause has been shown for extension of time as required under r. 275 of the Bankruptcy Rules.

Under the circumstances, even if it were open to me to grant an extension of time, I am not prepared to do so in view of the fact that there is no material before me to exercise my discretion to enable the judgment creditor to re-file an affidavit.

In any event, more than eleven months have lapsed since the alleged act of bankruptcy. Any affidavit verifying the petition to be re-sworn and refiled must be re-filed within six months from the alleged act of bankruptcy and as this has not been done, the judgment debtor has acquired a vested right which cannot be taken away.

In a last ditch stand to salvage her case, Counsel for the judgment creditor, cited to me the judgment of Williams J in the New Zealand Supreme Court case of in *Re Sutherland Manure Company* [1893] 11 NZLR 460 where his Lordship dismissed a petition for winding up on the ground that the facts afforded no justification at all for the making of a winding up order on the petition of a contributory. The Court went further and held that even if the petition were equivalent to a creditor's petition there was nothing on the face of it that would justify the granting of a winding up order. It had to appear on the face of the creditor's petition that the creditor's rights would in some way be prejudiced by the voluntary winding up but no such case had been made out on the petition.

It is true, however, that a preliminary objection had been taken that the affidavit verifying the petition was not sworn after but before the petition was filed. The learned Judge recognised the weight of the objection because if an affidavit is sworn in such circumstances the person making it would not be guilty of perjury if the affidavit were false. An affidavit verifying the petition was, however, filed 12 days after but did not attempt to explain why the requisite affidavit verifying the petition was not filed within the proper time. In these circumstances, the learned Judge made the chance and somewhat inconclusive remark - doubtless by way of *obiter dictum*:

> If however, that were the only other objection to the petition, probably the Court might in some way or other get over the difficulty which the petitioner has created for himself by neglecting the rule.

As against this are the other authorities cited above, which take a contrary view and which I prefer to follow.

On a concluding note, bearing in mind that bankruptcy proceedings, if successful, would have harsh and penal consequences, meticulous compliance with the law is often necessary. The case of *In re North, ex parte Hasluck* [1895] 2 QB 264 at 271 is authority for the proposition that the statute relating to bankruptcy should be construed in a manner most favourable to the person affected.

Also found at [1991] 1 CLJ 798